



CISG Advisory Council Opinion No. 7 I.  
Exemption of Liability for Damages Under Article 79 of the CISG

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This opinion is dedicated to the memory of Professor Peter Schlechtriem, our dear friend, colleague and teacher, who passed away on 23 April 2007.

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<sup>1</sup> The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Studies, Queen Mary, University of London, was elected Secretary. The CISG-AC has consisted of: Prof. Emeritus Eric E. Bergsten, Pace University; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford; Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At subsequent meetings, the CISG-AC elected as additional members, Prof. Pilar Perales Viscasillas, Universidad de La Rioja, Prof. Ingeborg Schwenzer, University of Basel, and Professor John Y. Gotanda, Villanova University. At its 11<sup>th</sup> meeting in Wuhan, People's Republic of China, Professor Eric Bergsten from Pace University School of Law, was elected Chair of the CISG-AC and Professor Sieg Eiselen, from the Department of Private Law of the University of South Africa, was elected Secretary.

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## Opinion

1. Article 79 exempts a party from liability for damages when that party has failed to perform any of its obligations, including the seller's obligation to deliver conforming goods.
- 2.1 If the non-performance or defective performance results from a third person's failure to perform, Article 79 sets forth different requirements for establishing an exemption, depending on the nature of the engagement of the third person with the contracting party.
- 2.2 Article 79(1) remains the controlling provision even if a contracting party has engaged a third person to perform the contract in whole or in part.
  - (a) In general, the seller is not exempted under Article 79(1) when those within its sphere of risk fail to perform; for example, the seller's own staff or personnel and those engaged to provide the seller with raw materials or semi-manufactured goods. The same principle applies to the buyer in relation to the buyer's own staff or personnel and those engaged to perform the obligations of the buyer under the contract.
  - (b) In exceptional circumstances, a contracting party may be exempted under Article 79(1) for the acts or omissions of a third person when the contracting party was not able to choose or control the third person.
- 2.3 Article 79(2) applies when a contracting party engages an independent third person to perform the contract in whole or in part. In such a case, the contracting party claiming an exemption must establish that the requirements set forth in Article 79(1) are satisfied both in its own regard and in regard to that third person.
- 3.1 A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79.
- 3.2 In a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based.

## Comments

### Introduction and scope of this opinion

Article 79 grants buyers and sellers an exemption from performance if they can establish that nonperformance was due to an “impediment” beyond their control which they could not reasonably have been expected to take into account when the contract was made and which, or the consequences of which, they could not reasonably have been expected to avoid or overcome. The second paragraph of Article 79 provides that a third person’s failure to perform may constitute grounds for exemption when the requirements for exemption under the first paragraph are satisfied with respect to both the party claiming exemption and the third person. A party failing to perform is required under the fourth paragraph of Article 79 to provide timely notice of the impediment and its effect on his ability to perform and, according to the previous third paragraph, the effect of the exemption is limited to the period of time during which the impediment subsists. The fifth and last paragraph of Article 79 does not restrict either party from claiming relief other than damages.

At the time this opinion is issued, Article 79 has been invoked in litigation and arbitration by sellers and buyers with limited success. Overall, sellers made only slightly more claims of exemption than buyers. The types of “impediments” claimed as an exemption by sellers have been as varied as those claimed by buyers, a variety matched by the types of goods involved in the transactions.

Any survey of reported decisions is to be read with caution, because the number of cases decided at this point do not allow but a few tentative conclusions regarding interpretative trends on CISG Article 79. Thus, whereas sellers have succeeded in claiming an exemption in some cases,<sup>2</sup> in many others their claims were denied.<sup>3</sup> Reported decisions also indicate that

<sup>2</sup> An indicative list of meaningful cases where sellers qualified for relief under Article 79 includes: Tribunal de commerce de Besançon, France, 19 January 1998, available in English translation at <<http://cisgw3.law.pace.edu/cases/980119f1.html>> (excusing a seller, who was found to have acted in good faith, on account of defective goods manufactured for seller’s supplier) [hereinafter cited as “Tribunal de commerce Besancon, 1998”]; Handelsgericht des Kantons Zurich, Switzerland, 10 February 1999, CLOUT Case No. 331, available in English translation at <<http://cisgw3.law.pace.edu/cases/990210s1.html>> (seller excused for paying damages for late delivery due to carrier’s failure to meet a guarantee that the goods would be delivered on time); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995, CLOUT Case No. 140, available in English translation at <<http://cisgw3.law.pace.edu/cases/950316r1.html>> (seller excused due to an emergency halt to production by seller’s supplier); Schiedsgericht der Handelskammer Hamburg, Germany, 21 March 1996, Clout Case No. 166, available in English translation at <<http://cisgw3.law.pace.edu/cases/960321g1.html>>.

<sup>3</sup> In two cases decided by Germany’s Supreme Court, subsequently addressed in this opinion, sellers were held to be conceivably excused on account of their failure to deliver conforming goods, but such exemption was denied on the specific facts of those cases. See, Bundesgerichtshof, Civil Panel VIII, Germany, 24 March 1999, CLOUT Case No. 271, available in English translation at <<http://cisgw3.law.pace.edu/cases/990324g1.html>> [hereinafter referred to as the “Vine wax case”]; Bundesgerichtshof, Germany, 9 January 2002, available in English translation at <<http://cisgw3.law.pace.edu/cases/020109g1.html>> [hereinafter the “Powder milk case”]

buyers were granted exemptions under Article 79,<sup>4</sup> their excuses having been rejected in many other cases.<sup>5</sup> There is considerable room for judicial appraisal and divergent interpretation of several words used in, and issues raised by, Article 79. However, the decisions reported to date do not bear out concerns that courts or arbitral tribunals might too readily excuse a party to perform, or initial fears that some civil law judges may reintroduce the requirement of fault by allowing a seller to show that defects were beyond its control,<sup>6</sup> or that some courts would rely too much on their domestic legal systems' concepts of *force majeure* and hardship with resulting diverging interpretations.<sup>7</sup>

Quite to the contrary, the bulk of judicial decisions and arbitral awards touching on Article 79 focus, by and large, on the standards for exemption that may qualify as excuses under the guise of "impediments". However, not every decision identifies facts that may become relevant to draw some tentative conclusions (e.g., the nationality of the parties, the type of goods involved or other details of the transaction), while others are incomplete in the sense that they merely state that the conditions of Article 79 have not been met. For example, a court finding a party exempted under Article 79 may be presumably satisfied that the alleged impediment was beyond the control of that party, yet one finds not much discussion in the available judicial decisions as to when that

<sup>4</sup> An indicative list of meaningful cases where buyers qualified for relief under Article 79 includes: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, 22 January 1997, available in English translation at <<http://cisgw3.law.pace.edu/cases/970122r1.html>> (buyer excused to pay damages for failure to take delivery due to State official's refusal to permit importation into the buyer's country) [hereinafter cited as "Arbitration. Russian Federation Chamber of Commerce, 1997"]; Amtsgericht Charlottenburg, Germany, 4 May 1994, available in English translation at <<http://cisgw3.law.pace.edu/cases/940915g1.html#cx>> (buyer excused on account of seller's delivery of non-conforming goods) [hereinafter cited as "Amtsgericht Charlottenburg, 1994"].

<sup>5</sup> The following may be listed among the cases in which the buyer's alleged impediment did not result in the tribunal granting excuse under Article 79: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995, available in English translation at <<http://cisgw3.law.pace.edu/cases/951017r1.html>> (buyer not excused to pay the purchase price on account of inadequate reserves of convertible currency), CLOUT Case No. 142; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, available in English translation at <<http://cisgw3.law.pace.edu/cases/980212bu.html>> (buyer not excused due to negative market developments and problems relating to storage of the goods).

<sup>6</sup> For an opinion echoing this fear, see John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* § 423.3 (3<sup>rd</sup> ed. 1999), available at <<http://cisgw3.law.pace.edu/cisg/biblio/honnold.html>>.

<sup>7</sup> For a comprehensive list of cases until 2004, where buyers and sellers were held to be excused and not excused under Article 79, see *The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, A/CN.9/SER.C/DIGEST/CISG/79, 8 June 2004 [hereinafter "UNCITRAL Digest"] Article 79 (published in June, 2004, and referring to 27 cases) available at <<http://cisgw3.law.pace.edu/cisg/text/digest-art-79.html>>. For a constantly updated chronological list of cases on Article 79, see Article 79. UNCITRAL's Digest Cases Plus Added Cases, available at <<http://cisgw3.law.pace.edu/cisg/text/digest-cases-79.html>>. See also, Peter Winship, *Exemptions Under Article 79 of the Vienna Sales Convention*, RabelsZ (2004) 495-510; Ronald A. Brand, *The Draft UNCITRAL Digest and Beyond. Article 79*, in 1 CILE Studies 392-407 (2005); Sonja A. Kruisinga, "(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?", Intersentia (2004) 123-154.

requirement should be deemed to have been met. Similarly, few cases have focused expressly on the requirements to be met for a party to claim successfully that the impediment could not have been reasonably taken into account at the time the contract was concluded. In the absence of decisions providing these type of guidelines it is not possible to assess whether courts and arbitral tribunals are relatively in harmony in their interpretation of Article 79. However, that at this point in time courts and arbitral tribunals have failed to provide firm guidelines does not make those requirements less important for an excuse to be found under Article 79. But this state of affairs explains why this opinion focuses on a limited number of issues that are likely to provoke differences in interpretation in different jurisdictions.

There are issues under Article 79 that, either as a result of flexibility in the language of the provision and an unusual level of ambivalence in its drafting history, leave courts and arbitrators with significant leeway when applying Article 79 to the facts before them. This opinion focuses on those issues because they are the most likely to be treated in light of the arbitrator's or judge's national law; or at least the most susceptible to provoke divergent approaches. One of those issues is whether a seller that has delivered non-conforming goods is eligible to claim an exemption under Article 79. A second issue, this time with a rather confusing drafting history, concerns the requirements to be met under the first and second paragraph of Article 79 by a seller that claims to be excused due to an impediment suffered by a third-party supplier or manufacturer to whom the seller looked as a source for supplying the goods. A third issue that is likely to reveal divergence in the approaches of judges and arbitrators is whether hardship may qualify as an "impediment" under Article 79 and, if so, what type of relief may be granted to the aggrieved party. Divergent interpretations on or about Article 79 may be discerned and continue to come up, but those issues may be the subject of future advisory opinions.

1. Article 79 exempts a party from liability to pay damages for failing to perform any of its obligations, including the seller's obligation to deliver conforming goods.

## Comments

Whether a seller delivering non-conforming goods may claim exemption of liability for damages under CISG Article 79 was an issue addressed at the Hague Conference in 1964, in connection with the drafting of Article 74 of ULIS (the counterpart to CISG Article 79). At that time, some delegates from common-law jurisdictions favoring a "warranty-based" liability in contract law raised concerns that the prevailing view in civil law jurisdictions, to the effect that contractual liability is based on proof of fault, might unduly influence civil-law judges or

arbitrators too ready to allow sellers to escape liability for defective performance, pleading events beyond their control that could not have been taken into account.<sup>8</sup>

Concerns with filtering in a fault-based concept of liability prompted some legal commentators to question whether delivery of defective goods may ever qualify as an impediment under Article 79. Thus, it has been argued that the choice of the word “impediment” was intended to denote an event external to the seller and to the goods, excluding the possibility that the seller’s liability for defects in the goods could ever be excused under Article 79.<sup>9</sup> In contrast, for those who approach liability for non-conforming goods from the standpoint of fault, a defect present in the goods at the time of the conclusion of the contract may conceivably constitute an impediment to the seller’s obligation to deliver conforming goods under CISG Article 35. Indeed, to the extent that delivery of conforming goods is expressed as a contractual obligation under the CISG (rather than in terms of warranties or guarantees), it stands to reason that a breach of the obligation to deliver conforming goods amounts to a seller’s failure to perform

<sup>8</sup> The discussion of this issue at the Hague Conference was centered on the choice between the word “obstacle” as opposed to “circumstances.” The latter word carried the day at The Hague on the assumption that a seller could be conceivably exempted from liability if the defects could not possibly have been detected at the time the contract was concluded. See Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* § 427 (3rd ed., 1999), available at <<http://cisgw3.law.pace.edu/cisg/biblio/honnold.html>>. The issue was revived when, years later, the UNCITRAL Working Group decided to adopt the word “impediment” in what later became Article 79 of the CISG. Commentary on the Draft Convention on Contracts for the International Sale of Goods, UNCITRAL Secretariat, Official Records, United Nations, New York, 1981, § 21 at 378 and § 36 at 380, also available at <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html>>

<sup>9</sup> See Barry Nicholas, *Impracticability and Impossibility in the U.S. Convention on Contracts for the International Sale of Goods* in Nina M. Galston & Hans Smit eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Matthew Bender § 5.02 at 5-10, available at <<http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html>> (stating that the choice of the word “impediment” resulted from the widely shared view that a seller could not be exonerated of liability for non-conforming goods). Nicholas explains that for a common law lawyer, whose point of departure is strict liability under an implied warranty of merchantability, it comes as something of a surprise that impossibility may be regarded as an excuse for breach of this warranty. See Nicholas, *Impracticability and Impossibility*, op. cit. supra, § 5.02 at 5-13 (“The common law lawyer does not, I think, see a warranty in the traditional sense as a promise of performance which is capable of becoming impossible or impracticable or of being frustrated. It is not a promise of a performance, but a guarantee of a fact and it is of the essence of a guarantee that impossibility is irrelevant to it.”).

“any of his obligations.” Accordingly, this type of breach may conceivably be excused due to an impediment of the kind described in Article 79.<sup>10</sup>

Cases in which a seller may be exempted of liability for delivering non-conforming goods are extremely rare. For example, goods that are unique and the subject of the contract may have already perished at the time of the conclusion of the contract and before the risk of loss passed to the buyer. In this exceptional case, Article 79 may apply as long as the seller had no knowledge of the prior destruction and could not reasonably have been expected to take the destruction of the goods into account at the time of the conclusion of the contract.<sup>11</sup> Indeed, sellers have invoked Article 79 to claim exemption from liability for their failure to deliver conforming goods and for late delivery – but with very limited success.<sup>12</sup> More importantly, fear that extending the exemption to delivery of non-conforming goods might reintroduce the principle of liability for fault through the “backdoor” has been allayed by the German Federal Supreme Court.

In the “*Vine wax case*,” a seller agreed to supply vine wax to be used by the buyer to protect grafts of grape vines from drying out and from the risk of infection.<sup>13</sup> The seller had acquired the wax from his supplier, which manufactured the wax in part with raw materials provided by a Hungarian supplier the seller had not used in previous years. The seller forwarded the wax from his supplier without opening the package, the wax did not protect the vines as it was supposed to, and the buyer brought suit against the seller. The intermediate appellate court found the seller liable for delivering goods below prevailing industry standards. Stating that in

<sup>10</sup> As noted before, the view that a seller delivering defective goods cannot find refuge under Article 79 appears to derive from questionable inferences regarding the adoption of the word “impediment,” at least whenever this term is read against the common law background of the warranty-based liability in contract. See Honnold, op. cit. supra, at 427; Nicholas, op. cit. supra, § 5.02. However, the seller’s obligation to deliver goods under the CISG is not established in terms of a warranty, but rather in terms of a general obligation to deliver goods free from defects, which includes an obligation to deliver substitute goods or repair the goods (CISG Art. 46(2) and 46(3)). Therefore, an insuperable impediment to deliver conforming goods may be able to excuse the seller. See Hans Stoll & Georg Gruber, in Peter Schlechtriem & Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG) Article 79*, at 812-13 (2d ed., Oxford University Press, 2005) (hereinafter “Schlechtriem & Schwenzer, *Commentary on the CISG*”) (questioning the inference that the adoption of the word “impediment” meant a return to the notion of “obstacle”, which had been discarded for Article 74 of ULIS, as if this choice of words were to suggest that a seller could find no excuse under CISG Article 79 for delivering non-conforming goods).

<sup>11</sup> But see Denis Tallon, in Bianca-Bonell, *Commentary on the International Sales Law* at 577-78, available at <<http://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html>> (“... the absence of the subject matter raises a problem of validity which is not governed by the Convention (see Article 4(a) ...”. See also, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, UNCITRAL Secretariat, Official Records, United Nations, New York, 1981, at 406, also available at <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html>>.

<sup>12</sup> In one case a French court exempted a seller for damages for failure to deliver conforming goods, and in another case a Swiss court found a seller exempt for late delivery. But in at least nine other cases the UNCITRAL Digest reports a seller’s claim for an exemption to have been denied. See UNCITRAL Digest and cases cited in notes 13 and 14, available at <<http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html>>.

<sup>13</sup> OLG Zweibrücken 31 March 1998, CLOUT No 272.



principle a seller could claim exemption when delivering non-conforming goods, the Regional Appeal Court of Zweibrücken held the seller liable on the ground that he failed to inspect the wax before sending it to the buyer. Affirming the seller's liability on different grounds, the Federal Supreme Court Germany ("BGH") did not find it necessary to make a general pronouncement on whether a seller could ever be exempt when delivering non-conforming goods. Disagreeing with the reasoning of the lower appellate court, the BGH held that, unless the parties otherwise agree (and in this case they did not), the seller undertakes the risk of acquiring conforming goods when he does not manufacture them himself. This line of reasoning suggests that the seller's liability under the CISG is one of guarantee, irrespective of fault, hence the irrelevance of the seller's failure to inspect.<sup>14</sup>

The BGH did not find it necessary to expressly address whether a party's failure to perform "any of his obligations" under the contract might include the failure of the seller or any of his suppliers to deliver conforming goods. Yet, resorting to an explanation why the seller could not be exempted from his failure to deliver conforming goods suggests that, in the opinion of the German Supreme Court, Article 79 might conceivably be applied to excuse a seller's failure to deliver conforming goods.<sup>15</sup> This reading of Article 79 conforms to what appears as the "plain meaning" of Article 79. Both the language ("... any of his obligations...") and the location of this provision in the CISG (Chapter V: "Provisions Common to the Obligations of the Seller and of the Buyer") suggests that the delivery of non-conforming goods amounts to a failure to perform an obligation within the meaning of Article 79 and Chapter V. Thus, there is no reason to exclude this obligation from the broad range of obligations whose failure to perform may be excused under Article 79.

In a subsequent case decided by the BGH, the "*Powder milk case*",<sup>16</sup> a buyer of powdered milk found the milk spoiled by lipase. The seller sought refuge in Article 79 arguing and even establishing that inactive lipase could not have been detected by application of any of the available and current testing techniques. The BGH was not satisfied with this excuse, holding that it was not enough for the seller to prove that properly administered testing techniques would not have detected lipase. The case was remanded to the lower court, which was instructed to ascertain whether the introduction of the lipase could have actually escaped the seller's control during the whole manufacturing process of the powdered milk (i.e., either by the seller's whole milk suppliers or during the seller's own processing of that milk). Thus, although recognizing that

<sup>14</sup> The BGH made profuse citations to conflicting scholarly opinions as to whether by referring to an impediment capable of exonerating the obligor from "any of his obligations," Article 79 could be relied upon to excuse the seller's obligations, and those of their suppliers, to deliver conforming goods.

<sup>15</sup> The BGH remanded the case to the lower appellate court for a determination on mitigation of damages and on whether the German buyer had used the goods for a purpose other than the one intended by the contract. More significant to the purposes of establishing the seller's liability squarely under the first paragraph of Article 79, rather than on the "double force majeure" scenario of the second paragraph, is the court's finding that the defects originated with the seller's 'sphere of influence,' so those defects could have been foreseen and prevented by the seller.

<sup>16</sup> BGH, 9 January 2002, available in English translation at <<http://cisgw3.law.pace.edu/cases/020109g1.html>>.

finding an excuse remains theoretically possible for a seller failing to deliver conforming goods, this judicial decision stresses once again the extremely heavy burden of proof faced by a seller seeking an excuse under Article 79 for delivering non-conforming goods.

Even if those decisions by the BGH fall short of an express pronouncement as to whether the seller may be exempt for delivering defective goods, the possibility for sellers to be exempted from liability under Article 79 for delivering non-conforming goods is reduced to a few marginal circumstances. Assume, for example, the case of a seller bound to deliver frozen goods which, due to a blackout or power failure occurring before the transfer of risk to the buyer but after the seller parted with the goods, arrive in a decomposed state at the place of delivery. Article 79 may apply in this case only if the seller succeeds in establishing that he did not know of the blackout and that the power failure was totally beyond his control. The seller would not be exempted of liability for damages if he reasonably could have been expected to take the possibility of a power failure into account at the time of the conclusion of the contract.

There are indeed very few chances for the seller to find an excuse for delivering non-conforming goods, for it is generally and correctly considered that sellers implicitly assume the risks involved in the procurement of the goods they sell. However, in the absence of an express or implicit warranty, the seller should not be deemed to guarantee, absolutely and unconditionally, that the goods are free from defects. Article 79 will gain in certainty and fairness if this straightforward interpretation is adopted, thus precluding dubious distinctions between excuses for failure to comply with the obligation to deliver conforming goods and those that may exonerate a party's failure to comply with other obligations arising out of the contract (e.g., failure to pack the goods in accordance with the contract under Article 35(2)(d)).

2.1	If the non-performance or defective performance results from a third person's failure to perform, Article 79 sets forth different requirements for establishing an exemption, depending on the nature of the engagement of the third person with the contracting party	
2.2	Article 79(1) remains the controlling provision even if a contracting party has engaged a third person to perform the contract in whole or in part.	
	(a)	In general, the seller is not exempted under Article 79(1) when those within its sphere of risk fail to perform; for example, the seller's own staff or personnel and those engaged to provide the seller with raw materials or semi-manufactured goods. The same principle applies to the buyer in relation to the buyer's own staff or personnel and those engaged to perform the obligations of the buyer under the contract.
	(b)	In exceptional circumstances, a contracting party may be exempted under Article 79(1) for the acts or omissions of a third person when the contracting party was not able to choose or control the third person.
2.3	Article 79(2) applies when a contracting party engages an independent third person to perform the contract in whole or in part. In such a case, the contracting party claiming an exemption must establish that the requirements set forth in Article 79(1) are satisfied both in its own regard and in regard to the third person.	

## Comments

The exemption under Article 79 would hardly become operative to relieve the seller from the obligation to deliver conforming goods in those cases in which the goods were produced, manufactured, and delivered by the seller or his own personnel, or in those cases where the buyer is to take delivery and pay without relying on any intermediate agent. But when the failure to deliver conforming goods, pay the price, or undertake any of the obligations arising under the contract result from the activities or omissions of the seller's secondary suppliers and sub-contractors, or by intermediate agents engaged by the buyer to take delivery or pay the price, the question arises whether such failure should be imputed to contracting parties under paragraph (1) or paragraph (2) of Article 79. Although Article 79(2) applies to both sellers and buyers seeking an excuse on account of a third person's failure to perform, this part of the opinion focuses on the conditions under which a seller could claim an exemption due to failure to perform by a third person.

Several courts and arbitral tribunals have addressed the question whether the seller may be excused due to an impediment allegedly beyond the control of a supplier to whom the seller looks to procure or produce the goods. In a handful of cases, the seller's plea to be excused has been granted, but in the majority of cases it has been held that the requirements of Article 79 have not been satisfied, even when the supplier's failure to deliver conforming goods was totally unforeseeable to the seller. Decisions vary, however, as to the analysis used by the courts to reach their conclusions. Some courts place the analysis of whether the seller qualifies for such an exemption under paragraph (1) of Article 79;<sup>17</sup> other tribunals prefer to examine the seller's exoneration under paragraph (2);<sup>18</sup> and still others opt for deciding the issue on the basis of Article 79 in the abstract.<sup>19</sup> Whether the seller's claim of exemption falls under one or the other paragraph is relevant for the purpose of determining where to place the burden of proof. The key issue is whether a supplier, subcontractor or third person to whom the seller looks for performance fits the phrase of Article 79(2) "a third person whom [the party claiming exemption] has engaged to perform the whole or part of the contract."

Article 79(2), where it applies, makes it more difficult to succeed in claiming an excuse because it demands that the requirements for exemption under Article 79(1) be satisfied with respect to both the party claiming exemption and the third person. It is not self-evident who are the "third persons" referred to in the second paragraph of Article 79, whose wording seems to result from

<sup>17</sup> Oberlandesgericht Hamburg, Germany, 28 February 1997, CISG-online 261, available in English translation at <<http://cisgw3.law.pace.edu/cases/970228g1.html>>; Hamburg Chamber of Commerce, partial award of 21 March 1996, RIW, 1996, at 766 et seq., available in English translation at <<http://cisgw3.law.pace.edu/cases/960321g1.html>>.

<sup>18</sup> International Chamber of Commerce, Award 8128/1995, UNILEX J.D.I. 1996, 1024 et seq., available in English translation at <<http://cisgw3.law.pace.edu/cases/958128i1.html>>

<sup>19</sup> Chamber of Commerce of the Russian Federation, Award 155/1994, 16 March 1995, Clout No. 140; available in English translation at <<http://cisgw3.law.pace.edu/cases/950316r1.html>>

a misunderstanding, among those who fought for the introduction of the second paragraph, regarding the meaning of the previous first paragraph.

No one disputes that under Article 79(1) the seller bears the risk of non-conformity owed to its own personal circumstances and to those employed by him to perform the contract and whose work the seller is to organize, coordinate, or supervise. The problem sought to be addressed more specifically in Article 79(2) is when the nonperformance or defective performance is due to the act or omission of a person or legal entity separate and distinct from the seller. There are at least two different types of “third persons,” but only one type is sought to be covered by Article 79(2).

The first identifiable group of “third persons” is composed of those who, while not entrusted with the performance of the contract vis-à-vis the buyer, nevertheless enable, assist, or create the preconditions for the seller’s delivery of conforming goods. These “third persons” may be distinct and separate from the seller, such as suppliers of raw materials, subcontractors of semi-manufactured parts and other “ancillary” or “auxiliary” agents whose performance is a precondition to the seller’s obligation to deliver conforming goods. These third-party suppliers or subcontractors, to whom the seller turns as a source for the supply of goods, are not the type of “third persons” contemplated in Article 79(2). There is a consistent line of decisions suggesting that the seller normally bears the risk that third-party suppliers or subcontractors may breach their own contract with the seller, so that at least in principle the seller will not be excused when the failure to perform was caused by its supplier’s default.<sup>20</sup> Article 79(1) remains the controlling provision to ascertain the liability of the seller for the acts or omissions of that type of “third persons” whose default cannot be invoked by the seller to excuse his own failure to deliver conforming goods. An exception should be allowed, however, for those very exceptional cases in which the seller has no control over the choice of the supplier or its performance, in which case the supplier’s default may be established as a genuine impediment beyond the control of the seller.<sup>21</sup>

The second group of “third persons” identifiable under Article 79(2) is composed by those who are “independently” engaged by the seller to perform all or part of the contract directly to the buyer. It is not easy to ascertain the precise meaning of “... a third person whom [the party claiming exemption] has engaged to perform the whole or part of a contract ...”, but the expression seems to point to those third persons who, unlike third-party suppliers or subcontractors for whose performance the seller is fully responsible, are not merely separate and

<sup>20</sup> See UNCITRAL Digest, Article 79, text accompanying note 56 and cases cited therein.

<sup>21</sup> Hans Stoll & Georg Gruber, in Peter Schlechtriem and Ingeborg Schwenzer eds., *Commentary on the UN Convention on the International Sale of Goods (CISG)* Article 79, at 819-22 (2d ed., Oxford University Press, 2005).

distinct persons or legal entities, but also economically and functionally independent from the seller, outside the seller's organizational structure, sphere of control or responsibility.<sup>22</sup>

In cases where the defects result from a failure of this genuinely "independent" third person, the prerequisites for exemption under Article 79(2) have to be met cumulatively by both the seller and the third person. In this particular case, the seller's liability stretches to answer for the conduct of such an independent "third person", unless the impediment was insuperable for the seller and, additionally, the independent third person would qualify for exemption under Article 79(1) if such third person had been the seller. Thus, Article 79(2) is meant to increase the seller's liability, for it makes the seller in principle responsible for defective performance incurred by independent third persons as if it were the seller's own conduct.<sup>23</sup> Of course the seller's liability is not unconditional, for in exceptional cases he may be able to establish that he had no control over the choice of such third person, either because the third person enjoys a monopoly in the supply of goods or services, or if the third person was chosen by the buyer, or if the seller may otherwise establish that default by the third person was actually beyond his control.

To the extent that the circumstances of the case allow a distinction between the two types of "third persons," it is clear that it would be more difficult for the seller to be exempted from liability for the acts of an "independent" third person under Article 79(2), than to be exonerated for the delivery of non-conforming goods procured from or manufactured by a supplier to whom the seller has resorted to deliver the goods. However, the drafting history of Article 79(2) reflects confusion by some delegates, to whom the policy of making it more difficult for the seller to be exempted of liability on account of the conduct of a genuinely independent "third person" was not so clear. Those delegates sought unsuccessfully to expressly include suppliers, subcontractors, and any person working independently for the seller under Article 79(2).<sup>24</sup>

<sup>22</sup> See Denis Tallon, in *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (ed. by M. Bianca and M.J. Bonell, Milan, 1987) at 545, available at <<http://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html>>.

<sup>23</sup> According to UNCITRAL's official records, tightening the conditions under which a seller could claim exemption sought to avoid, among other consequences, "that a party should be exempted from liability because he had chosen an unreliable supplier ...". *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by UNCITRAL's Secretariat*, Official Records, United Nations, New York, 1981 [hereinafter "Commentary on the 1978 Draft Convention"] § 23 at 379 par. 23 (motion by Denmark) and § 35 at 380 (comment by Norwegian delegate).

<sup>24</sup> See A. Vischer, *Provisions Common to the Obligations of the Seller and of the Buyer*, in *The 1980 Vienna Convention on the International Sale of Goods* 179 (Lausanne Colloquium, November 19-20, 1984). If the explicit inclusion of suppliers would have been carried into paragraph (2) of Article 79, it would have eliminated the possibility of exemption for the seller in cases of non-conformity, because the suppliers and sub-suppliers who manufactured the goods could never qualify for the exemption. But the rejection of the proposal to include the suppliers explicitly into paragraph (2) of Article 79 does not necessarily lead to the conclusion that the seller's potential exemption of liability for non-conforming goods is to be placed under paragraph (1) of Article 79.

If anything, Article 79(2) and its legislative history suggests that the phrase “a third person whom [a party] has engaged to perform the contract” should be given a narrow scope, covering cases such as those in which the seller turns over to a third person the seller’s obligation to manufacture the goods according to specifications given by the buyer, or whenever the seller delegates to a third person the seller’s obligation to procure the goods and deliver them to the buyer. In either case, the seller can succeed on a claim to be exempted for damages for failure to perform only if the seller can establish that the third person was himself prevented to perform by an impediment qualifying as an excuse under Article 79(2).<sup>25</sup> This interpretative approach appears to be consistent with a sound allocation of risks arising from nonconformity of the goods.

Although a seller who depends on ancillary suppliers cannot always control the conformity of the goods, it seems fair to assign to the seller the risk of non-conformity and resulting damages for non-conformity as part of the overall procurement risk borne by sellers. Even though the first and second paragraphs of Article 79 provide for different requirements for a party to be excused on account of another person’s failure to perform, for all practical purposes most cases are likely to be resolved under Article 79(1). This is, indeed, the conclusion reached by the German Supreme Court (BGH) in the “*Vine wax case*” referred to in connection with the question whether a seller could ever be exempt under Article 79 for delivering non-conforming goods.

In that case, an Austrian seller invoked an exemption from liability under Article 79(1) on the ground that it played the role of a mere intermediary in a contract to supply vine wax to a German buyer, which vine wax the seller had manufactured with raw materials acquired from a Hungarian supplier. The seller’s central argument was that it was exempted from liability under Article 79 on the grounds that the alleged defects were caused by the supplier and were, therefore, “beyond his control.” The BGH held that it makes no difference under Article 79(1) whether the defect could be imputed to the seller or to its suppliers or sub-suppliers. According to the court, the existence of the defects should in any event be imputed to the seller, for even if caused by the suppliers or sub-suppliers, such defects are deemed to be within the seller’s “sphere of influence.” In a subsequent case, also touching upon Article 79, the “*Powder milk case*”,<sup>26</sup> the BGH once again suggested that it is “all the seller’s fault” even in cases where the failure to perform appears to be blamed on the seller’s suppliers. Since the seller was unable to establish whether the lipase that spoiled the powdered milk had been introduced by his whole milk suppliers or during the seller’s processing of the milk, the BGH reversed a lower court judgment with instructions to ascertain whether the spoiling of the powdered milk had been actually beyond the seller’s control.

<sup>25</sup> John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 546-46 (Kluwer International, 2d ed., 1999).

<sup>26</sup> BGH 9 January 2002, available in English translation at <<http://cisgw3.law.pace.edu/cases/020109g1.html>>.

Attributing to the seller the responsibility for the supplier's actions under Article 79(1) appears consistent with a sound policy of placing the risks involved in non-conformity on the party who is in the best position to avoid or minimize those risks. The seller may be exempted from liability in some extreme and exceptional cases, such as when the supplier is the only available source of supply, or when other supplies are unavailable due to unforeseeable and extraordinary events, or in situations in which the defects in the goods are unconnected with the typical procurement risks assumed by the seller.

3.1	A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79.
3.2	In a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based.

### Comments

Under a variety of legal doctrines, most of which can be traced back to the doctrine of *rebus sic stantibus* developed by the Roman *praetor*, unforeseeable and extraordinary change of circumstances rendering a contractual obligation extremely burdensome though not absolutely impossible, may entail the avoidance or even the revision or "adaptation" of the contract or one of its clauses. The variety of national laws and legal doctrines (e.g., *imprévision*, *frustration of contract*, *commercial impracticability*, *Wegfall der Geschäftsgrundlage*, *eccesiva onerosita sopravvenuta*), coupled with the amplitude of the term "impediment" in Article 79, provides a fertile ground for judges and arbitrators to take divergent approaches to the question whether a party whose performance has turned extraordinarily burdensome (in economic terms or otherwise, hereinafter identified as "hardship").<sup>27</sup> Not surprisingly, scholarly opinions are divided on whether this situation of hardship, short of impossibility, is governed by Article 79. Whereas some consider that the wording of Article 79 is sufficiently flexible to include an extreme

<sup>27</sup> See Tallon, Article 79, in *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* § 3.1 at 592 (1987), available at <<http://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html>> ; Hans Stoll & Georg Gruber, in Schlechtriem & Schwenzer, *Commentary on the U.N. Convention*, op. cit. supra, Article 79, § 39, at 822-26. See also Honnold, *Uniform Law*, op. cit. supra, at 434 (suggesting the adoption of a "comparative law approach" towards the notion of impediment under Article 79, taking into account the "prevailing patterns and trends of modern domestic law").



situation of unexpected hardship within the meaning of “impediment”,<sup>28</sup> others opine that there is no place in the CISG for any relief on account of economic hardship.<sup>29</sup>

Concerns for the word “impediment” employed in Article 79 and its proper interpretation have been voiced by commentators from a broad spectrum of legal systems. According to one scholarly opinion the word “impediment” is “vague and imprecise,”<sup>30</sup> another pointed to several “contradictions and ambiguities” in the use of that term,<sup>31</sup> and a third characterized the word “impediment” as a “chameleon-like” example of “superficial harmony which merely mutes a deeper discord.”<sup>32</sup> The legislative as well as the drafting history of Article 79 is not conclusive enough to warrant a conclusion that the hardship problem was meant to be excluded or included within its scope.

As to the legislative history of Article 79, there is ample support for the proposition that the Convention does not favor an easy exemption from nonperformance and that the notion of “impediment” under Article 79 points to an insurmountable obstacle that is unrelated to the more flexible notions of hardship, impracticability, frustration, or the like.<sup>33</sup> However, that background is insufficient to warrant the conclusion that CISG Article 79 cannot exempt a

<sup>28</sup> See, e.g., Denis Tallon in *Commentary on the International Sales Law* Article 79 at § 3.2 (1987) (“[T]he judge will have a natural tendency to refer to similar concepts in his own law. Thus, the judge of a socialist country will have a restrictive approach to force majeure... On the contrary a common lawyer will feel inclined to refer to the more flexible notions of frustration and impracticability. In the Roman-German system, the judge will reason in terms of force majeure...”). See also M. J. Bonell, *Force majeure e hardship nel diritto uniforme della vendita internazionale*, in *Diritto del commercio internazionale* 590 (1990) (observing that by requiring that the obligor “could not reasonably be expected ... to have avoided or overcome [the impediment] or its consequences” suggests that, at least in principle, the possibility should be entertained that performance has become so onerous that it would be unreasonable to enforce it).

<sup>29</sup> See, e.g., Barry Nicholas, who observed that exemption of liability on account of unexpected and excessive economic hardship was “out of place” in a sales law. Progress Report of the Working Group on the International Sale of Goods on the Work of its Fifth Session (A/CN.9/87, Annex III, reprinted in UNCITRAL YEARBOOK V:1974 (1975) at 66.

<sup>30</sup> B. Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods*, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* § 5.02 at 5-4 (Parker School of Foreign and Comparative Law, Columbia University, ed. Nina M. Galston & Hans Smit, 1984), available at <<http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html>>.

<sup>31</sup> D. Tallon, *Commentary to Article 79*, in *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* 594 (Giuffrè, Milan, 1987), available at <<http://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html>>.

<sup>32</sup> E. A. Farnsworth, *Perspective of Common Law Countries*, in *La vendita internazionale* 19 (Congress at S. Margherita Ligure, Sept. 1980, Giuffrè, 1981).

<sup>33</sup> Article 79 was drafted in response to the criticism of Article 74 of the 1964 Uniform Law on International Sales, to the effect that “a party could be too readily excused from performing his contract.” But the criticism that ULIS Article 74 was insufficiently clear and subjective led to the substitution of the word “impediment” for “circumstances,” so that the conditions for exemption are more narrowly and objectively identified. It is on record that one of the reasons for the UNCITRAL’s Working Group’s adoption of the term “impediment” in Article 79 was to exclude the scenario, envisioned under Article 74 of ULIS, in which the obligor could escape liability when performance had become unexpectedly difficult for reasons beyond his control.



party from performing its obligations, in whole or in part, when the impediment is represented by a totally unexpected event that makes performance excessively difficult.

As to the drafting history of this provision, isolated discussion of proposals that were dismissed or the comments by some delegates may lead one to conclude that there was some type of consensus among the members of the Working Group against the doctrine of “hardship.”<sup>34</sup> In fact, some passages of the *travaux préparatoires* appear to indicate that the choice of the word “impediment” was made for the purpose of adopting a unitary conception of exemption with the intention of setting aside the theory of *rebus sic stantibus*, *imprévision*, or hardship theories based on “changed circumstances.” Thus, according to some legal commentators, the exclusion (*rectius*: rejection) of hardship from the scope of Article 79 would emerge from its drafting history.<sup>35</sup> Following the successive drafts preceding what finally became Article 79, the Working Group of UNCITRAL considered but rejected a proposal allowing a party to claim avoidance or adjustment of a contract whenever facing unexpected “excessive damages”.<sup>36</sup> Yet, a closer look at this passage reveals that after briefly setting out the arguments in support of the proposal, the report simply stated that it was not adopted, not reappearing in subsequent discussions.<sup>37</sup>

Other commentators have seized upon the rejection of a Norwegian proposal linked to a passage of what later became Article 79(3) in order to infer a rejection of the position that Article 79 may extend its application to a situation of genuine hardship. Thus, when the issue of temporary impediment came up for discussion at the Diplomatic Conference, the Norwegian delegation suggested the inclusion of an additional provision to the effect that the temporary exemption from performing may turn into a permanent exemption if, after the impediment ceases to exist, the circumstances had so changed that performance would become manifestly unreasonable.<sup>38</sup> The proposal gained significant support from other delegations, but the French delegate raised his concerns that introducing such a provision may be regarded as an acceptance of doctrines such as *imprévision*, frustration of purpose, and the like. Although the recollection of the discussions among the participant delegates, or what should be made out of those

<sup>34</sup> See the discussion in John Honnold, *Documentary History of the Uniform Law for International Sales* 185, 252 (1989) (hereinafter Honnold, *Documentary History*).

<sup>35</sup> See Honnold, *Documentary History*, at 252.

<sup>36</sup> See Honnold, *Documentary History*, op. cit. supra, at 350, recalling that a proposal aimed at incorporating an article allowing a party to “claim an adequate amendment of the contract or its termination” on account of “excessive difficulties” was expressly rejected by UNCITRAL’s Working Group.

<sup>37</sup> Report of Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods (A/32/17, annex I, paras. 458-60), reprinted in UNCITRAL YEARBOOK VIII:1977 (1978), 57. See also John Honnold, *Documentary History* at 350.

<sup>38</sup> See A/Conf.97/C.1/SR.27 at 10. The Norwegian proposal led to the deletion of the word “only” in Article 79(3), so that even if the initial and temporary impediment vanishes, the resulting change of circumstances, which may well be of an economic nature, may turn into another impediment leading to that party’s exemption from liability.

discussions, is far from uniform, the rejection of the Norwegian proposal did not settle the issue of economic hardship because it was actually not discussed as such. If it is accepted that the drafting history has any controlling role to play - which is a debatable issue - such history evidences that the discussions were not conclusive on this question.<sup>39</sup>

Several court decisions have rejected the possibility that negative market developments constitute an impediment within Article 79(1). Indeed, as of the time of the drafting of this opinion, no court has exempted a party from liability on the grounds of economic hardship. As to noticeable case-law developments, a German court of first instance is reported to have stated in dicta that the German doctrine of *Wegfall der Geschäftsgrundlage* does not apply because the CISG “fills the field in this area” and therefore forces out the otherwise applicable domestic law.<sup>40</sup> An Italian court of first instance, in a decision reported in the same year, in a case that was not governed by the CISG, considered but ultimately refused to apply the doctrine of “supervening excessive onerousness,” as adopted in Article 1467 et seq. of the Italian Civil Code.<sup>41</sup>

According to the Italian court in Monza, this variation on the doctrine of “hardship” could not conceivably find its way into the Vienna Sales Convention, because hardship is not expressly excluded under Article 4 of the CISG, thus being an issue left unsettled in the CISG.<sup>42</sup>

<sup>39</sup> Speculation about what the intention of the drafting group might have been with regard to the scope of application of CISG Article 79 is unlikely to be too accurate, especially when we are left to our inferences from fragments in the travaux préparatoires. Indeed, the dismissal of a proposal which did not even address whether hardship should be given any space within the Convention is no proper foundation upon which to build an argument on the “intention of the legislator”.

<sup>40</sup> LG Aachen, Germany, UNILEX, No. 43 0 136/92 (May 14, 1993) (the case involved a German seller of acoustic prosthetics against an Italian buyer who refused to take delivery of the goods under the contract).

<sup>41</sup> *Nuova Fucinati, S.p.A., v. Fondmetall International A.B.*, Tribunale di Monza, Italy, 14 January 1993, Clout No. 54, reproduced in English translation 15 J.L. & Com. 153 (1995), available at <<http://cisgw3.law.pace.edu/cases/930114i3.html>>. In this case, the Italian seller’s (Nuova Fucinati) failed to deliver 1,000 tons of metal that a Swedish buyer, Fondmetall, had contracted to purchase. Faced with a court-imposed injunction sought by Fondmetall, Nuova Fucinati alleged that delivery of the 1,000 tons of metal was impossible due to Fondmetall’s refusal to take delivery of another load of metal ordered at the same time. The Italian seller also sought to avoid its obligation to the Swedish buyer arguing that, prior to delivery of the 1,000 tons of metal, the price of the goods on the international market had risen so swiftly and unexpectedly that the fundamental equilibrium of the performances had been significantly altered, to the point of justifying the termination of the contract under Article 1467 of the Italian Civil Code.

<sup>42</sup> The Italian court’s discussion as to the applicability of Article 79 to an “impediment” that makes performance short of impossible was pure dicta, because the court decided that CISG was not applicable. According to the court of Monza, the CISG could not apply under Article 1(1)(a) because the CISG had not entered into force in Sweden at the time the contract was concluded and it was not applicable under Article 1(1)(b) because, in the opinion of the court, such a provision applies only in the absence of an express choice of law by the parties. For a critical view on this approach to applicability of the CISG, see Ferrari, *Uniform Law of International Sales: Issues of Applicability Under Private International Law*, 15 J. L. & Com. 159, 161 (1995), available at <<http://cisgw3.law.pace.edu/cisg/biblio/ferr1.html>>.

There are not many cases dealing with situations of hardship in which courts have found it fair to provide relief, and no cases have been found at the time this opinion is drafted in which a court has provided well-grounded reasons explaining why a change in circumstances was unpredictable or why one type of relief was more appropriate than others. To this date, there are no reported decisions whereby a court exempted a party from liability on the ground of hardship. This state of affairs is not inconsistent with the admission, by a majority of legal commentators, that a fair legal system should admit some flexibility within the general principle of *pacta sunt servanda* to account for a genuine situation of hardship. The question to be raised then is what type of factual scenario may be proposed for an exceptionally “hard” case of hardship that would merit relief.

Resorting to the type of scenarios designed in the comments accompanying UNIDROIT Principles Article 6.2.2, one may envision a situation where a buyer “A”, domiciled in State X, concludes a contract of sale with a seller “B”, domiciled in State Y. Payment is agreed to be made in State Z within three months, upon delivery of the goods, in the currency of State Z. Let us imagine that within a month of the conclusion of the contract a totally unpredictable political and economic crisis, which the parties could not have reasonably taken into account, leads to a massive devaluation of 80% of Z’s currency. As a result of this totally unanticipated and massive devaluation of the currency, the sale turns out extremely burdensome for the buyer “A” and a gross windfall for the seller “B”.<sup>43</sup>

Assuming then that the CISG applies to a contract subject to a situation of hardship such as the one previously described, the question is whether the aggrieved party should be entitled to find relief under the terms of the CISG by reading the word “impediment” in Article 79 to include hardship or by concluding that there is a gap within the CISG to be filled by some underlying general principle via the “governed-but-not-settled” gap-filling technique promoted by CISG Art. 7(2). If the CISG applies, then it naturally preempts other, potentially applicable domestic rules dealing with hardship. But if the hardship question cannot be thus settled, there is no alternative other than resorting to domestic legal rules, hoping that the applicable law would provide for some risk-share allocation of remedies.

The alternative of resolving the hardship problem within the four corners of the CISG is more palatable than the other, because leaving the question to the conflict of law rules of the forum leads to a great diversity of potentially applicable legal doctrines. It is submitted that the interpreter who takes seriously the CISG’s confessed purpose of unifying the law of sales, as

<sup>43</sup> Admittedly, it is not easy to ascertain whether the change in circumstances could not have been reasonably foreseen. It is not an easier task to distinguish between the risk of loss that every contracting party should be deemed to have assumed and the extraordinary disastrous economic disadvantages amounting to a “limit of sacrifice” (because there is indeed such a limit), beyond which the obligor should not be expected to perform the contract as written. For an enlightening discussion of a “true hardship problem” based on a factual scenario in which a deal unexpectedly turned into a “nightmare” for one party and a “steal” for the other, see Joseph Lookofsky, *Walking the Article 7(2) Tightrope Between CISG and Domestic Law*, 21 *Journal of Law and Commerce* 87 (2005).

articulated in Article 7(1), will probably exhaust all technically available means to respond to the hardship problem within the “four corners” of the Convention, rather than resorting to the application of potentially disparate domestic legal rules and doctrines.

Before proceeding to examine the type of relief that may be found under the CISG for a true hardship problem, it is important to recall that termination or adjustment of a contract on grounds of hardship may be regarded in some legal systems as a validity-related issue, so that it may be argued that the hardship issue is excluded from the scope of application of the CISG by virtue of Article 4.<sup>44</sup> The argument deserves careful consideration, because it has been reported that in some Scandinavian legal systems the issue of hardship is approached as an issue of validity.<sup>45</sup> In this case, there is something to be said in favor of granting the defaulting party the benefit of finding appropriate relief by choosing among competing domestic doctrines of hardship. But this approach does not sound convincing or persuasive. Unlike a situation of unconscionability (usury, *lésion* or gross disparity of the performances at the time the contract is concluded), which clearly falls under the rubric of validity, the hardship problem tends to be associated in most legal systems with force majeure or impossibility of performance, that is, a situation of exoneration or mitigation of liability due to events subsequent to the conclusion of the contract, more than as a case of nullity or avoidance due to infirmities or flaws affecting the contract from its inception.<sup>46</sup> Moreover, every benefit potentially obtained from allowing national doctrines of hardship to compete for its application is more than offset by the high price in terms of uniformity that is to be paid under this approach.

<sup>44</sup> See J. Lookofsky, *Understanding the CISG in the USA* (2d ed., 2004) § 2.6 and Joseph Lookofsky, *The Limits of Commercial Contract Freedom Under the UNIDROIT 'Restatement' and Danish Law*, 46 Am. J. Comp. Law 485, 496 (1998), also available at <<http://cisgw3.law.pace.edu/cisg/biblio/lookofsky6.html>>, referring to the hardship provisions in the General Clause of the Danish Contracts Act, authorizing a court to refuse enforcement or to adjust “any unreasonable contract or term, and that includes a term which becomes unreasonable after the contract is made”. Professor Lookofsky also refers to Dutch Civil Code Article 6:258(1) as an illustration of a provision that appears to question the “validity” of a contract (“Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside; in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.”).

<sup>45</sup> See, e.g., Tom Southerington, *Impossibility of Performance and Other Excuses in International Trade*, Publication of the Faculty of Law of the University of Turku, Private law publication series B:55, available at <<http://cisgw3.law.pace.edu/cisg/biblio/southerington.html>>. Southerington refers to Section 36(1) of the Finnish Contracts Act, which the author considers as a rule of validity akin to unconscionability.

<sup>46</sup> A much criticized 1993 decision by the Tribunale Civile di Monza entered (unnecessarily for the purposes of the case before the court) to examine the legal nature of hardship under Italian law and its relationship with the CISG. The Italian court stated that “... hardship is not a matter expressly excluded in Article 4 of the CISG. Dissolution of the contract for supervening excessive onerousness affects neither the validity of the contract nor ownership over the goods ...”. Tribunale Civile di Monza, 14 January 1993, CLOUT Case 54, reproduced in English in <<http://cisgw3.law.pace.edu/cases/930114i3.html>>.

If it is accepted that a situation of genuinely unexpected and radically changed circumstances, in truly exceptional cases, may qualify as an “impediment” under Article 79(1), it deserves a legal response under the Convention that would preempt the application of domestic rules on hardship.

It is certainly not possible or even convenient to attempt a definition of hardship, beyond accepting that the impediment may entail a situation of “economic impossibility” which, while short of an absolute bar to perform, imposes what in some legal systems is conceptualized as a “limit of sacrifice” beyond which the obligor cannot be reasonably expected to perform.

In most cases market fluctuations are not to be considered an “impediment” under CISG Article 79, because such fluctuations are a normal risk of commercial transactions in general. Whether wild and totally unexpected market fluctuations in goods or currency could ever become an “impediment” is another matter. Indeed, the theoretical possibility of such radical and unexpected changes admits the application of Article 79 in those rare instances as the one exemplified above.

The next issue to tackle is to ascertain the contours of the remedial guidelines that may be followed to grant the most appropriate remedy or relief after hardship has been found to exist. One may infer from the obligation to interpret the Convention in good faith a duty imposed upon the parties to renegotiate the terms of the contract with a view to restore a balance of the performances. In case negotiations fail, there are no guidelines under the Convention for a court or arbitrator to “adjust,” or “revise” the terms of the contract so as to restore the balance of the performances. Even if one were not ready to stretch the principle of good faith buried in CISG Article 7(1) in order to find a balance of the performances,<sup>47</sup> CISG Article 79(5) may be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus “adapting” the terms of the contract to the changed circumstances.

<sup>47</sup> A suggestion by Peter Schlechtriem to this effect may be found in *Transcript of a Workshop on the Sales Convention*, in 18 *Journal of Law and Commerce* 191-258, 236-37 (1999), available at <<http://cisgw3.law.pace.edu/cisg/biblio/workshop-79.html>>.